IN THE SUPREME COURT OF OHIO

National Collegiate Athletic Association, et al., Defendants-Appellants, v. Steven Schmitz, et al., Plaintiffs-Appellees.	Case No. 2017-0098 Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. CA-15-103525

REPLY BRIEF OF APPELLANTS NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, AND UNIVERSITY OF NOTRE DAME DU LAC

Frederick R. Nance (0008988)
Steven A. Friedman (0060001)
Sean L. McGrane (0091287)
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114
Telephone: (216) 479-8500
Facsimile: (216) 479-8780
fred.nance@squirepb.com
steven.friedman@squirepb.com
sean.mcgrane@squirepb.com

Attorneys for Defendant-Appellant National Collegiate Athletic Association

Matthew A. Kairis* (0055502)
**Counsel of Record*
Yvette McGee Brown (0030642)
Aaron Michael Healey (0091709)
Benjamin M. Flowers (0095284)
M. Ryan Harmanis (0093642)
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
makairis@jonesday.com
ymcgeebrown@jonesday.com
ahealey@jonesday.com
bflowers@jonesday.com
rharmanis@jonesday.com

Attorneys for Defendant-Appellant University of Notre Dame du Lac

Counsel for Plaintiffs-Appellees and Amici listed on next page

Sandy Meizlish (000026220)
Robert E. DeRose (0055214)
BARKAN MEIZLISH HANDELMAN
GOODIN DEROSE WENTZ, LLP
250 E. Broad St., 10th Fl.
Columbus, OH 43215
Telephone: (614) 221-4221
Facsimile: (614) 744-2300
smeizlish@barkanmeizlish.com
bderose@barkanmeizlish.com

David D. Langfitt (PHV No. 5921-2017)
Melanie J. Garner (PHV No. 6051-2017)
LOCKS LAW FIRM
The Curtis Center
Suite 720 East
601 Walnut Street
Philadelphia, PA 19106
Telephone: (215) 893-3423
Facsimile: (215) 893-3444
dlangfitt@lockslaw.com
mgarner@lockslaw.com

Richard S. Lewis
HAUSFELD, LLP
1700 K. Street, N.W.
N.W. Suite 650
Washington, DC 20006
Telephone: (202) 540-7200
Facsimile: (202) 540-7201
rlewis@hausfeld.com

Attorneys for Plaintiffs-Appellees

Anne Marie Sferra (0030855)
Noorjahan Rahman (0096038)
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215
Phone: (614)227-2300
Facsimile: (614)227-2390
asferra@bricker.com
nrahman@bricker.com

Attorneys for Amicus Curiae,
Ohio Association of Civil Trial Attorneys

Jonathan R. Stoudt (0083839)
ROURKE & BLUMENTAL, LLP
495 South High Street, Suite 450
Columbus, OH 43215
Phone: (614) 220-9200
Facsimile: (614) 220-7900
jstoudt@randbllp.com

Attorney for Amicus Curiae,
Ohio Association for Justice

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This case involves two propositions of law. Notre Dame and the NCAA briefed both issues. The appellees—Yvette Schmitz and the Estate of Steven Schmitz—did not. Instead, they declined to address the second issue, and declared the first too "obvious" to merit sustained discussion. Neither answer is satisfactory.

ARGUMENT

I. Proposition of Law No. 1: A diagnosis for the long-term effects of an injury a plaintiff already knew about does not revive a time-barred claim.

Each of the claims in this case seeks recovery for the latent, long-term effects of injuries that immediately manifested decades ago, when Steven Schmitz played football at Notre Dame. It follows that the discovery rule is inapplicable, and that the two-year limitations period in R.C. 2305.10(A) had long since expired by the time the Schmitzes filed suit in October 2014. What is more, the limitations period would have expired before October 2014 *even if* the discovery rule applied, because the Schmitzes knew or should have known of Mr. Schmitz's alleged injury and its alleged cause more than two years earlier. Neither the Estate nor Mrs. Schmitz has an adequate response to this.

A. The discovery rule does not apply to this case if the facts alleged are true.

1. Each of the Schmitzes' claims is governed by R.C. 2305.10(A). Under that statute, "an action for bodily injury . . . shall be brought within two years after the cause of action accrues." When does a "cause of action accrue[]"? It depends. When an injury "manifest[s] itself immediately," the cause of action accrues—and the two-year limitations period begins to run—immediately. *O'Stricker v. Jim Walter Corp.*, 4 Ohio St.

3d 84, 87, 90, 447 N.E.2d 727 (1983). This is true even if the full extent of the injury remains unknown: Latent effects of a previously known injury do not restart the statute of limitations. *See Allenius v. Thomas*, 42 Ohio St. 3d 131, 133-34, 538 N.E.2d 93 (1989); *accord, e.g.*, *Erickson v. Scotsman, Inc.*, 456 N.W.2d 535, 539 (N.D. 1990). "When an injury does *not* manifest itself immediately, the cause of action arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured, whichever date occurs first." *O'Stricker*, 4 Ohio St. 3d at 90. Put more simply, the discovery rule applies only in cases where the alleged injury did not immediately manifest itself, and provides that statutes of limitation are tolled only "until the plaintiff discovers, or by the exercise of reasonable diligence should have discovered, that he or she was injured by the wrongful conduct of the defendant." *Norgard v. Brush Wellman, Inc.*, 95 Ohio St. 3d 165, 2002-Ohio-2007 ¶8.

The discovery rule is inapplicable in this case, because the Complaint alleges that the injuries on which the claims are based manifested themselves immediately. The Schmitzes filed this suit seeking relief for "the latent effects" of brain injuries Mr. Schmitz claimed to have suffered in the 1970s, while playing football for Notre Dame. First Amended Complaint ("Complt.") ¶129; *see id*. ¶19. According to the Complaint, Mr. Schmitz "experienced concussion symptoms" at the time he sustained those brain injuries. Complt. ¶64. In other words, the brain injuries for which the Schmitzes sought

relief were immediately manifest. While the alleged "full effect" of those injuries (CTE) was not immediately manifest, that is irrelevant to the discovery rule's application. *Allenius*, 42 Ohio St. 3d at 133-34. Therefore, the two-year limitations period in R.C. 2305.10(A) began running *no later than* 1978—the last year that Mr. Schmitz competed at Notre Dame—and expired by the time the Schmitzes filed suit in October 2014.

2. In response to all of this, the Estate and Mrs. Schmitz attempt to re-characterize the relevant injury. According to them, the "injury" on which their claims are based ought to be narrowly understood as "the neurodegenerative disease known as Chronic Traumatic Encephalopathy." Appellees Br. 1 ("Resp. Br."). Mr. Schmitz, they say, had no reason to be aware of *that* disease until his December 31, 2012 diagnosis. Even though Mr. Schmitz experienced concussion symptoms in the 1970s, he did not "recognize[]" the significance of those symptoms at the time, Resp. Br. 5 (quoting Complt. ¶68), and so "*never* knew that he had an injury of any kind and never knew that he had been exposed to the risk of a latent brain disease until he was diagnosed" with CTE. Resp. Br. 9. Accordingly, Mrs. Schmitz and the Estate say, the injury did not immediately manifest, the discovery rule applies, and the statute of limitations did not begin running until Mr. Schmitz received his diagnosis on December 31, 2012. *Id.* This argument suffers from three flaws: It contradicts the facts alleged, it misconstrues the law, and it advocates for an understanding of the discovery rule that is irreconcilable with the legislative objectives that R.C. 2305.10(A) promotes.

Contradicting the Complaint. The response brief contradicts the pleadings in two important ways. First, it narrowly characterizes the relevant injury as "CTE," whereas the Complaint alleges that CTE is simply the effect of brain injuries that manifested decades earlier. The Complaint expressly alleges that, "[o]n many occasions in drills, practices, and games," Mr. Schmitz "experienced concussion symptoms, including but not limited to being substantially disoriented as to time and place." Complt. ¶64. That is, the Complaint alleges that Mr. Schmitz sustained brain injuries "on many occasions" as a football player, and that these injuries manifested in the form of concussion symptoms. According to the Complaint, Mr. Schmitz's CTE and other neurological impairments were the "*latent effects*" of those brain injuries. Complt. ¶129 (emphasis added) ("Steve Schmitz is permanently disabled based on the latent effects of neuro-cognitive and neuro-behavioral injuries he sustained while playing football at Notre Dame.") It thus follows from the Complaint itself that Mr. Schmitz's CTE is not a wholly distinct injury from the brain injuries that Mr. Schmitz allegedly experienced at Notre Dame, but rather the long-term effect of those injuries. In other words, the brain injuries sustained in the 1970s are the injuries on which the claims in this case are based.

The Estate and Mrs. Schmitz attempt to evade this, arguing that the distinctness of CTE is a "scientific issue not yet subject to discovery." Resp. Br. 13. This overlooks the procedural posture. At the motion-to-dismiss stage, the Court must assume the truth of the facts alleged. Here, the Complaint expressly alleges that CTE *is* the latent

effect of the brain injuries Mr. Schmitz experienced at Notre Dame. That resolves the discovery rule's application at this stage.

Similarly unavailing is the response brief's reference to federal district court decisions holding that CTE is a new injury to which the discovery rule applies. *See* Resp. Br. 16 n.13 (citing *In re Nat'l Hockey League Players' Concussion Injury Litig.*, No. MDL 14-2551, 2015 WL 1334027 (D. Minn. Mar. 25, 2015); *McCullough v. World Wrestling Entm't, Inc.*, 172 F. Supp. 3d 528 (D. Conn. 2016)). Both decisions rest on an abstract, intuitive analysis of whether CTE is a distinct injury from the brain injuries that cause it. *See* Appellants Br. 21–22 ("Init. Br."). That is, they characterize CTE as a distinct injury without looking to the facts the plaintiffs alleged. Because that approach is inconsistent with Ohio law, these decisions are irrelevant.

The response brief's failure to grapple with the nature of the injury alleged explains its misplaced reliance on *Liddell v. SCA Servs. of Ohio, Inc.*, 70 Ohio St. 3d 6, 635 N.E.2d 1233 (1994). In that case, this Court applied the discovery rule to claims brought by a police officer who contracted nasal cancer about six years after being exposed to chemicals. *Id.* at 8-9. Though the officer sustained injuries at the time of his exposure, they were entirely distinct from the cancer he later contracted. *Id*. at 13. Thus, the relevant injury—the cancer—did not immediately manifest itself, and the discovery rule tolled the statute of limitations until the officer discovered it. *Id*. The Estate, Mrs. Schmitz, and amicus Ohio Association for Justice claim that *Liddell* requires affirmance,

arguing Mr. Schmitz's CTE is analogous to Liddell's cancer. *See* Resp. Br. 10–12; Ohio Ass'n for Justice Br. 7–8. Not so. Nothing in *Liddell* suggests that the plaintiff's cancer was the long-term effect of the relatively minor injuries (watering eyes, a scratchy throat, and so on) experienced years earlier. 70 Ohio St.3d at 7. Here, by contrast, the Complaint expressly states that Mr. Schmitz's CTE was the latent effect of brain injuries sustained decades earlier. Complt. ¶129. These allegations make the discovery rule, and *Liddell*, inapplicable. Indeed, the case is materially indistinguishable from *Pingue v. Pingue*, 2004-Ohio-4173 (5th Dist 2004), which refused to apply the discovery rule to the claims of a plaintiff who knew that he had been injured decades earlier, but waited to sue until he learned that his injuries worsened into an "irreversible brain injury." *Id*. ¶10. *Pingue* was rightly decided, and its logic applies here.

The response brief deviates from the facts alleged in a second way: It repeatedly denies that Mr. Schmitz "knew he sustained an injury while he was in college." Resp. Br. 8, 10, 12. That is not what the Complaint says. Instead, it says that Mr. Schmitz "experienced concussion symptoms, including but not limited to being substantially disoriented as to time and place," "*at Notre Dame*." Complt. ¶64 (emphasis added). Perhaps what the Estate and Mrs. Schmitz mean to say is that Mr. Schmitz did not understand the significance of the brain injuries that he allegedly experienced. The Complaint does indeed say that, alleging that Mr. Schmitz never "recognized" his "symptoms . . . as an injury that should be monitored, treated, or even acknowledged."

Complt. ¶65. But whether Schmitz understood the *significance* of his injury is beside the point: The discovery rule is inapplicable with respect to injuries that immediately manifest themselves. S*ee O'Stricker*, 4 Ohio St. 3d at 87, 90. And an injury manifests itself in the form of felt symptoms—for example, the concussion symptoms that Mr. Schmitz experienced. Complt. ¶64. That Mr. Schmitz failed to interpret his symptoms as signs of a brain injury makes no difference. Suggesting otherwise is like saying that a motorist who tears his ACL in a car crash has not sustained an immediately manifest injury if he interprets his inability to walk as only a sprain. That is not the law.

Misunderstanding the law. The response brief gets the law wrong in three ways.

First, the discovery rule does not apply when an injury is immediately manifest, *even if* the full extent of the injury is unknown. Thus, latent effects do not restart statutes of limitation, while latent injuries do. Mrs. Schmitz and the Estate ignore this rule in arguing that the only "injury" in this case is CTE. Again, the Complaint expressly alleges that Mr. Schmitz's CTE was the "latent effect" of brain injuries that immediately manifested in the form of concussion symptoms decades earlier. Complt. ¶129; *see also id*. ¶¶19, 64. Since the Complaint acknowledges that it seeks relief for latent effects of injuries that manifested immediately, the discovery rule is inapplicable. Indeed, if the discovery rule applied notwithstanding these allegations, then it is difficult to imagine the case in which the rule would *not* apply: Plaintiffs could simply identify a latent effect, insist that the new effect is really a new injury, and proceed to

trial. This approach would effectively eliminate the latent-injury–versus–latent-effect distinction, permitting the easy evasion of R.C. 2305.10(A). Allowing plaintiffs to easily evade statutory law with the discovery rule—a judge-made exception to statutes of limitation—contravenes the principle that "statutes of limitation are a legislative prerogative." *Wetzel v. Weyant*, 41 Ohio St. 2d 135, 138, 323 N.E.2d 711 (1975).

The Ohio Association for Justice similarly errs in relying on medical-malpractice cases like *Hershberger v. Akron City Hosp.*, 34 Ohio St. 3d 1, 516 N.E.2d 204 (1987), to argue that the "the mere presence of some physical symptom alone [does] not constitute an 'injury' for the purpose of determining when a cause of action accrues" under the discovery rule. Ohio Ass'n for Justice Br. at 4–7. The Complaint expressly alleges that Mr. Schmitz sustained brain injuries while playing football for Notre Dame, and that his CTE was the latent effect of those injuries rather than an altogether new injury. And so the question here is not when Mr. Schmitz had notice of an injury sufficient to trigger the limitations period under the discovery rule. To the contrary, the relevant question is the analytically prior one: Does the discovery rule apply at all? No, because, under the facts alleged, Mr. Schmitz's CTE was the latent effect of brain injuries that Mr. Schmitz sustained, and that immediately manifested, decades ago.

Second, the Estate and Mrs. Schmitz also err in arguing that a statute of limitations cannot begin running until the plaintiff learns that he has been injured *and also* that the injury is the result of the defendants' conduct. *See, e.g.*, Resp. Br. 13. They

rely on this rule to attempt to show that Mr. Schmitz's claims did not accrue in the 1970s. At that time, they say, he did not know that his coaches were behaving wrongfully when they taught players to tackle in a manner that led to head injuries.

This argument fails, because it makes no difference whether the plaintiff knows who caused his injury when the injury manifests immediately. The rule on which Mrs. Schmitz and the Estate rely—that a statute of limitations begins to run only once the plaintiff "discovers, or by the exercise of reasonable diligence should have discovered . . . not just that [he] has been injured but also that the injury was 'caused by the conduct of the defendant,'" *Norgard*, 2002-Ohio-2007 ¶¶8–9—applies *only* when the discovery rule applies. *See also* Ohio Ass'n for Justice Br. at 4-7 (citing medical malpractice cases that apply the same rule). When the discovery rule is inapplicable, as in cases where the injury manifests itself immediately, the statute of limitations begins to run *without regard* to whether the plaintiff knows the injury's cause. *See Flowers v. Walker*, 63 Ohio St. 3d 546, 549–50, 589 N.E.2d 1284 (1992); *Baxley v. Harley-Davidson Motor Co.*, 2007-Ohio-3678 ¶8 (1st Dist.); *Braxton v. Peerless Premier Appliance Co.*, 2003-Ohio-2872 ¶14 (8th Dist.). In those circumstances, the plaintiff is on notice that he must identify a potential defendant within two years if he wishes to sue. Here, the Complaint alleges that Mr. Schmitz's injury manifested immediately, and so it makes no difference whether he knew that Notre Dame or the NCAA caused his injury.

Third, the Estate and Mrs. Schmitz suggest, in a footnote, that declining to apply the discovery rule "could," "potentially," if "all similar claims brought by all former football players" are barred, "effectively violat[e] the right-to-remedy provision of the Ohio Constitution." Resp. Br. 15 n.12. They never raised this argument below. They do not truly raise it now, instead only hinting at the possibility that the right-to-remedy clause might be implicated. Anyway, the right-to-remedy provision is irrelevant to this case. That clause prohibits the General Assembly from denying litigants a chance to seek a remedy for the violation of a "vested" right in accordance with law. *Groch v. Gen. Motors Corp*., 117 Ohio St. 3d 192, 2008-Ohio-546 ¶150 (citation omitted); *see also* Ohio Const. art. I, §16. In this case, Mr. Schmitz had two full years to file suit after sustaining brain injuries that immediately manifested, satisfying the Clause's requirements.

Contravening the General Assembly's goals. The third major problem with the response brief is its inconsistency with the legislative purposes behind R.C. 2305.10(A). Statutes of limitation "serve a gate-keeping function for courts by '(1) ensuring fairness to the defendant, (2) encouraging prompt prosecution of causes of action, (3) suppressing stale and fraudulent claims, and (4) avoiding the inconveniences engendered by delay—specifically, the difficulties of proof present in older cases.'" *Flagstar Bank, F.S.B. v. Airline Union's Mortg. Co.*, 128 Ohio St. 3d 529, 2011-Ohio-1961 ¶7 (quoting *Pratte v. Stewart*, 125 Ohio St. 3d 473, 2010-Ohio-1860 ¶42). In their initial brief, the NCAA and Notre Dame explained that the discovery rule is consistent with these

purposes *only if* courts limit its application to cases involving latent injuries, as opposed to the latent effects of patent injuries. Init. Br. 25–32. The Eighth District watered down this latent-injury–versus–latent-effect distinction by holding that the limitations period began running only once Mr. Schmitz discovered that he had CTE—a condition that the Complaint expressly describes as a "latent effect[]" of brain injuries that immediately manifested during the 1970s. Complt. ¶129. A proper respect for the legislature's decision to enact R.C. 2305.10(A) mandates reversal.

The Estate and Mrs. Schmitz barely address this argument. *First*, they make no effort to show that their broad understanding of the discovery rule—under which plaintiffs could toll statutes of limitation until the discovery of conditions that they *concede* are the "latent effects" of earlier experienced injuries—is consistent with the four legislative objectives laid out in *Flagstar Bank*. Instead, they insist that the forty-plus years that passed between Mr. Schmitz's playing days and this case do not pose "a significant barrier to a fair litigation and trial *of this matter*." Resp. Br. 18 (emphasis added). This argument is doubly flawed: It mistakenly casts the relevant inquiry as whether *this case* can be fairly litigated, and then wrongly concludes that it can be.

As to the first point, the relevant question is not whether "this matter" can be fairly litigated; it is whether the Eighth District's broad understanding of the discovery rule would undermine (among other things) the fairness interests that R.C. 2305.10(A) is supposed to promote. The Court's resolution of this particular matter is of great

importance to the parties. But the rule the Court announces will have a much greater impact on everyone else. As the NCAA and Notre Dame explained, the broad discovery rule for which the appellees advocate would undermine the objectives of R.C. 2305.10(A) generally—including the interest in ensuring fairness to defendants.

As to the second point, the passage of time *does* matter in this case, as the Estate and Mrs. Schmitz's contrary arguments inadvertently establish. According to them, it will be easy to determine whether Mr. Schmitz's time at Notre Dame caused the CTE with which he was diagnosed decades later. All the parties need do is find former players, hale them into depositions and courtrooms, and ask them about decades-old memories. The Estate and Mrs. Schmitz even suggest reaching out to athletes who played under different coaching staffs years after Mr. Schmitz graduated—including Notre Dame's counsel, Matt Kairis, who played football at Notre Dame in a different decade for a different coach (Lou Holtz, not Ara Parseghian). Resp. Br. 19. Even if such evidence were relevant, during the intervening decades "memories have faded, witnesses have died or disappeared, and evidence has been lost." *Howard v. Allen*, 30 Ohio St. 2d 130, 137, 283 N.E.2d 167 (1972) (quoting *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)). Rather than confronting the difficulties stale evidence presents, the Estate and Mrs. Schmitz claim the passage of time makes no difference. Resp. Br. 19–20. But the notion that sufficient evidence might be found, regardless of how many

years have passed, is an argument against having *any* statutes of limitation. The General Assembly already rejected that argument when it enacted R.C. 2305.10(A).

Intervening events over years or decades make a stale claim even more difficult to adjudicate. The cause of decades-old injuries rarely can be reliably determined. The response brief does nothing to suggest that the head-injury context is any exception: Mr. Schmitz played football before and after he attended Notre Dame, including in the National Football League, and the passage of time makes it next to impossible for any jury to reliably untangle who (if anyone) is responsible for cognitive and neurological problems he experienced late in life.

To be sure, a principled application of R.C. 2305.10(A) may prevent some plaintiffs from litigating otherwise-meritorious suits. That, however, should not lead the Court to disregard it. Statutes of limitation matter *only* in otherwise-meritorious suits. There would be no need for a discovery rule if statutes of limitation operated only against frivolous claims. So the insistence that it would be unfair to apply R.C. 2305.10(A) in concussion cases, Resp. Br. 17; Ohio Ass'n. for Justice Br. 9–10, is another argument against *all* statutes of limitation—an argument the legislature rejected.

The Estate and Mrs. Schmitz also dismiss the availability of damages for future injuries in suits for current harms, asserting that Mr. Schmitz would not have been able to prove in the 1970s that he would develop CTE. Resp. Br. 15 n.12. Even if that were true, Notre Dame and the NCAA made clear that plaintiffs cannot always recover for

future harms and must "carry their burden of proving entitlement to such relief." Init. Br. 27. Regardless, the Estate and Mrs. Schmitz's argument is beside the point. The question is not whether Mr. Schmitz could have shown he would develop CTE. Instead, it is whether Mr. Schmitz could have brought an action for the brain injuries that the Complaint alleges he experienced at Notre Dame. The answer is "yes." A plaintiff cannot wait until an injury worsens—or shows latent effects—to bring a claim. Otherwise (to take facts more mundane than those in this case), a teen who slipped and hurt his leg could sue the responsible store fifty years later for his hip replacement.

B. The Schmitzes' claims would be time barred even if the discovery rule applied.

Assume for the sake of argument—and contrary to the Complaint—that Mr. Schmitz's alleged CTE was an altogether new injury, rather than the latent effect of brain injuries sustained decades earlier. If those facts were true, the discovery rule would indeed apply. The claims would nonetheless be time barred, however, because the Schmitzes were on notice of Mr. Schmitz's alleged CTE, and its cause, more than two years before he and his wife filed this suit.

1. "[T]he discovery rule entails a two-pronged test." *Norgard*, 2002-Ohio-2007 ¶9. Specifically, when the discovery rule applies, the relevant statute of limitation runs from the time that the plaintiff "discovers, or by the exercise of reasonable diligence should have discovered," (1) that he "has been injured" and (2) "that the injury was 'caused by the conduct of the defendant.'" *Id*. (quoting *O'Stricker*, 4 Ohio St.3d at 86).

Applying this two-step test to the facts alleged in the Complaint, the two-year limitations period in R.C. 2305.10(A) began running before October 2012, and had thus expired by the time the Schmitzes filed suit in October 2014.

First, the facts alleged establish that Mr. Schmitz was on notice of his injury before October 2012. *See* Init. Br. 33–34. The Complaint alleges that doctors diagnosed Mr. Schmitz with CTE on December 31, 2012. Complt. ¶20. But it also alleges that CTE involves "progressive cognitive decline." Complt. ¶41. Consistent with this, the appellees conceded below that Mr. Schmitz exhibited "severe memory loss, cognitive decline, early onset Alzheimer's disease, traumatic encephalopathy, and dementia" by the time of his diagnosis. Br. of Plaintiffs-Appellants at 5, *Schmitz v. Nat'l Collegiate Athletic. Ass'n*, No. 103525 (8th Dist. Dec. 11, 2015); *see* Complt. ¶19. The only plausible inference is that Mr. Schmitz's disease manifested long before his diagnosis. Even viewing the facts alleged in the light most favorable to the Estate and Mrs. Schmitz, Mr. Schmitz "discover[ed], or by the exercise of reasonable diligence should have discovered, that he . . . was injured" before October 2012. *Norgard*, 2002-Ohio-2007 ¶8.

This leaves only the question whether Mr. Schmitz was on notice of his injury's cause before October 2012. The answer is yes. *See* Init. Br. 35–38. According to the Complaint, Mr. Schmitz's diagnosis followed nearly a century of studies linking head injuries—in particular, head injuries sustained playing football—to long-term cognitive decline. Complt. ¶¶70–101. These effects were "long recognized," Complt. ¶70, and

some reports saying so even "received national attention," Complt. ¶88. It was against this backdrop, according to the Complaint, that the NCAA in 2010 "required its member institutions to have a Concussion Management Plan . . . in place for all sports." Complt. ¶109. The Complaint also alleges that Notre Dame's coaches taught and proactively rewarded behavior that resulted in concussions, Complt. ¶¶61-63, 105, and that Notre Dame and the NCAA wrongfully withheld information on the dangers of head injuries, Complt. ¶¶102-09. Mr. Schmitz of course knew of the coaching methods at the time he played. And he either knew or should have known about the supposedly withheld information on the dangers of head injuries no later than 2010. It follows that, by 2010 at the latest, he and his wife were on notice of the alleged causal link between his alleged injuries and the alleged wrongful conduct.

In sum, the Schmitzes either knew or reasonably should have known about Mr. Schmitz's CTE, and the wrongful conduct alleged to have caused it, before October 2012. The two-year limitations period had thus expired before they filed suit in October 2014.

2. The Estate and Mrs. Schmitz respond in three ways, none convincing. *First*, they describe as "spurious and speculative" the inference that the Schmitzes were on notice of Mr. Schmitz's neurological condition at some point before October 2012. Resp. Br. 20. This inference, they say, is improper at the motion-to-dismiss stage: "It is a subject of discovery and, possibly, a factual dispute to be submitted to a jury." Resp. Br. 21. This argument ignores the applicable standard. Because there is not yet any record,

this Court must assume the truth of the facts alleged and draw all "*reasonable inferences* deducible therefrom." *Vandemark v. Southland Corp.*, 38 Ohio St. 3d 1, 7, 525 N.E.2d 1374 (1988) (emphasis added). The only "reasonable inference" here is that Mr. Schmitz exhibited symptoms before October 2012—just two months before his diagnosis, when he was *concededly* unemployable and exhibiting "severe memory loss, cognitive decline, early onset Alzheimer's disease, traumatic encephalopathy, and dementia." Br. of Plaintiffs-Appellants at 5, *Schmitz*, No. 103525 (8th Dist.). If the alleged facts are true, the Schmitzes were on notice of Mr. Schmitz's CTE before October 2012.

Second, the Estate and Mrs. Schmitz argue that the two-year limitations period in R.C. 2305.10(A) began running only once doctors formally diagnosed Mr. Schmitz with CTE. *See* Resp. Br. 18. Statutes of limitation, they say, begin to run under the discovery rule "[o]nly when in the exercise of due diligence the plaintiff obtains a diagnosis from a competent specialist." Resp. Br. 19. This Court's case law says otherwise:

> When an injury does not manifest itself immediately, the cause of action arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured, *whichever date occurs first*.

O'Stricker, 4 Ohio St. 3d at 90 (emphasis added). The NCAA and Notre Dame discussed this principle, Init. Br. 34–35, but the Estate and Mrs. Schmitz do not. Nor do they acknowledge that their position—and the Eighth District's, *Schmitz v. Nat'l Collegiate Athletic Ass'n*, 2016-Ohio-8041 ¶25 ("App. Op.")—requires overruling *O'Stricker*.

Finally, the Estate and Mrs. Schmitz argue that the publicly available information regarding the link between head injuries and football is irrelevant. While the Complaint alleges nearly a century of well-publicized studies, the Estate and Mrs. Schmitz insist that those allegations are, "of course, directed to the Appellants." Resp. Br. 21. This is a strange position. The Complaint's allegations are to be assumed true as to all parties, not just the defendants. Here, if the allegations are assumed true, then the link between head injuries and football was easily discoverable to anyone interested in the matter no later than 2010. The Estate and Mrs. Schmitz cannot escape this by insisting that they meant to direct their allegations to the NCAA and Notre Dame alone.

II. Proposition of Law No. 2: Plaintiffs' fraudulent-concealment and constructive-fraud claims are subject to R.C. 2305.10(A)'s two-year statute of limitations.

Ohio's two-year statute of limitations for claims for bodily injury governs "all actions the real purpose of which is to recover damages for injury to the person." *Andrianos v. Cmty. Traction Co.*, 155 Ohio St. 47, syl. ¶2, 97 N.E.2d 549 (1951). Following this precedent and canons of statutory construction, Notre Dame and the NCAA explained that R.C. 2305.10(A)'s two-year limitations period for bodily injury applies to all of the Estate and Mrs. Schmitz's claims; even those restyled as claims for "fraud." Init. Br. 38-47. The Estate and Mrs. Schmitz dismiss this entire proposition of law as a "red herring," and insist without argument that the Eighth District got it right. Resp. Br. 22. They are wrong. The question whether R.C. 2305.10(A) applies is significant, and the Eighth District resolved it incorrectly.

A. Whether the two-year statute of limitations for bodily injury applies to the Estate and Mrs. Schmitz's fraud claims matters, in general and for this case. In general, *Andrianos* remains good and binding precedent from this Court. Plaintiffs should not be able to avoid it by pretending it does not exist and hoping that lower courts do too. The Estate and Mrs. Schmitz's preferred rule would, contrary to this Court's precedent, permit plaintiffs to use "clever pleading or . . . another theory of law" to transform one action "into another type of action subject to a longer statute of limitations." *Love v. City of Port Clinton*, 37 Ohio St. 3d 98, 100, 524 N.E.2d 166 (1988) (citation omitted).

In this case, whether the limitations period is two years or four has real consequences, particularly if the discovery rule applies. The NCAA and Notre Dame contend that, if the discovery rules applies, the Schmitzes' claims accrued at some point before October 2012, in light of CTE's progressive nature and the widespread availability of information linking CTE to football. Even if the Court rejects that argument at the motion-to-dismiss stage, however, the NCAA and Notre Dame could still *prove* that the Schmitzes' claims accrued at some point before October 2012. The question whether R.C. 2305.10(A) governs the fraud claims would then be of critical importance: If it does, the claims are time barred if they accrued at any point before October 2012. But if 2305.09 governs these claims instead, then they are timely so long as they accrued later than October 2010. So, if it turns out that the Schmitzes' claims

accrued *between* October 2010 and October 2012, the question whether the claims are timely will turn on whether R.C. 2305.09 or R.C. 2305.10(A) applies.

B. Despite dismissing the second proposition of law as a "non-issue," the Estate and Mrs. Schmitz assert that the Eighth District distinguished *Andrianos* and properly relied on *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St. 3d 54, 56, 514 N.E.2d 709 (1987), in holding that R.C. 2305.09 governs the fraud claims. Resp. Br. 23-25. Wrong and wrong.

First, the Eighth District did not silently distinguish *Andrianos*. While the court said that the fraud claims are "separate and distinct from the other claims," it gave no explanation for this conclusion. App. Op. ¶40. Neither do the Estate and Mrs. Schmitz in their response brief. There is no plausible explanation to give. Init. Br. 38–45.

Second, with respect to *Gaines*, the Estate and Mrs. Schmitz simply parrot its holding that R.C. 2305.09 applies to fraud claims that are "separate and independent" from bodily-injury claims. *Gaines*, 33 Ohio St.3d at 55. It is unclear how this is supposed to help them: The NCAA and Notre Dame acknowledged this rule in their initial brief. But they went on to show that the Schmitzes' fraud claims are *not* separate and independent from their bodily injury claims; the "essential character" of each is an action for bodily injury. Init. Br. 45–47. The Estate and Mrs. Schmitz have no response.

CONCLUSION

This Court should reverse the Eighth District, and hold that all of the claims in this case are time barred.

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Respectfully submitted,

s/ Matthew A. Kairis

Matthew A. Kairis (0055502)
Yvette McGee Brown (0030642)
Aaron Michael Healey (0091709)
Benjamin M. Flowers (0095284)
M. Ryan Harmanis (0093642)
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
makairis@jonesday.com
ymcgeebrown@jonesday.com
ahealey@jonesday.com
bflowers@jonesday.com
rharmanis@jonesday.com

Attorneys for Defendants-Appellants University of Notre Dame du Lac

Frederick R. Nance (0008988)
Steven A. Friedman (0060001)
Sean L. McGrane (0091287)
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114
Telephone: (216) 479-8500
Facsimile: (216) 479-8780
fred.nance@squirepb.com
steven.friedman@squirepb.com
sean.mcgrane@squirepb.com

Attorneys for Defendants-Appellants National Collegiate Athletic Association

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on Friday, January 26, 2018, a true copy of this brief was served upon the following by electronic mail:

Robert E. DeRose
Counsel of Record
Sandy Meizlish (000026220)
MEIZLISH HANDELMAN
GOODIN DEROSE WENTZ
250 E. Broad Street, 10th Floor
Columbus, OH 43215
Email: bderose@barkanmeizlish.com
smeizlish@barkanmeizlish.com

David D. Langfitt
Melanie J. Garner
LOCKS LAW FIRM
The Curtis Center, Suite 720 East
601 Walnut Street
Philadelphia, PA 19106
Email: dlangfitt@lockslaw.com
mgarner@lockslaw.com

Richard S. Lewis
HAUSFELD LLP
1700 K Street, N.W.
NW Suite 650
Washington, D.C. 20006
Email: rlewis@hausfeld.com

Attorneys for Plaintiffs-Appellees

Frederick R. Nance
Steven A. Friedman
Sean L. McGrane
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
Email: fred.nance@squirepb.com
steven.friedman@squirepb.com
sean.mcgrane@squirepb.com

Attorneys for National Collegiate Athletic Association

Anne Marie Sferra
Noorjahan Rahman
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215
Phone: (614)227-2300
Facsimile: (614)227-2390
asferra@bricker.com
nrahman@bricker.com

Attorneys for Amicus Curiae,
Ohio Association of Civil Trial Attorneys

Continued on next page

Jonathan R. Stoudt
ROURKE & BLUMENTAL, LLP
495 South High Street, Suite 450
Columbus, OH 43215
Phone: (614) 220-9200
Facsimile: (614) 220-7900
jstoudt@randbllp.com

Attorney for Amicus Curiae,
Ohio Association for Justice

/s/ Matthew A. Kairis

One of the attorneys for Defendant-Appellant University of Notre Dame du Lac